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SEP 16 192
CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY, Appellant,

v.

STATE OF MISSISSIPPI EX REL RUSH H. KNOX, Attorney General

No. 28.

STATEMENT AND BRIEF FOR THE APPELLANT.

WILLIAM H. WATKINS,
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Supreme Court of the United States

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY, Appellant

vs.

STATE OF MISSISSIPPI

ex rel RUSH H. KNOX, Attorney General

No. 28.

STATEMENT AND BRIEF FOR THE APPELLANT

STATEMENT

Official Report 119 So. 360.

The Superior Oil Company, appellant, a Mississippi corporation, domiciled at Biloxi, Mississippi, during the years 1926 and 1927 conducted at its domicile a distributing station for the sale of petroleum products. At Biloxi there are located a number of manufacturing plants where raw shrimp and oysters are packed for commercial purposes. The supply of shrimp and oysters is obtained from the Louisiana marshes east of the Mississippi River contiguous to the Gulf of Mexico. The shrimp are taken from the waters and the oysters from the reefs by boats which are propelled by gasoline, by seamen who are referred to in this case as fishermen. They sell their output almost exclusively to packers in Biloxi, Mississippi; de-

liveries are made to the packers by fishermen in Louisiana waters and are transported in the boats of the packers to Biloxi. Grants Pass, a point in the Gulf of Mexico within the state of Louisiana, is a harbor or roadstead which forms the base of operations for fishermen engaged in catching shrimp and taking oysters. It is the point at which, under the laws of the state of Louisiana, fishermen are licensed and their operations are carried on from this place. In order to procure the necessary gasoline to operate their boats, the fishermen contract with the packers at Biloxi, Mississippi, to obtain for them at Biloxi, Mississippi, the supply of gasoline required and to transport the same to the fishermen at Grants Pass in the state of Louisiana. The Superior Oil Company is under contract with the packers to supply the requirements of these fishermen. It obtains gasoline in tank car lots from beyond the state of Mississippi, stores the same in its own private tanks, a portion of which is used in local sales at Biloxi. A large supply, however, is always kept on hand to supply the requirements of the fishermen in the Louisiana marshes. A fisherman desiring gasoline would, in due course of business, notify one of the packers at Biloxi, Mississippi, to obtain for him a stated amount of gasoline. The packer would place an order with the appellant, Superior Oil Company, for an amount equal to the requirements of the fisherman. The Superior Oil Company would draw the gasoline from its tank into fifty gallon drums. The same being sealed were delivered to the master of the packer's boat, consigned to the packer at Grants Pass, Louisiana. The form of receipt issued by the master of the boat was as follows:

"No. 4882 Biloxi, Miss., 12/20/1927

"Received in good order and condition from Superior Oil Company, Biloxi, Miss.

No. Pieces	Description of Articles	Weight
2 drums gasoline		

"Consigned to Gussie Fontaine Pkg. Co., destination Grant's Pass, La., by boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co. The master of said boat, Frank Louis, acknowledges receipt of said goods and agrees to deliver merchandise as consigned in like order and condition.

"It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination, but that all due caution and carefulness will be exercised by master and crew of said boat Frank Louis to protect said property and effect a safe delivery without undue delay.

"In consideration of the packet rate charged for carrying the property described herein the owners of this boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence, this damage and loss shall be sustained by owners of boat accepting this shipment.

"366-537 (signed) Joseph Adams
"Master of Boat Frank Louis.

"Received $----------collect--to supply in prepayment of packet charges, on property hereon described from Biloxi, Miss., to Grant's Pass, La. For Master of Boat."

Delivery was made to the packer's boat at the wharf in Biloxi at the water's edge of the Mississippi Sound. The appellant charged the gasoline to the packer with whom the order was placed by the fisherman. The boat transported the gasoline to Grant's Pass and there delivered it to the fisherman who had ordered the same. The whole voyage of the gasoline being continuous from the plant of the oil company until delivery in Louisiana. The packer would settle with the

appellant monthly for the gasoline thus purchased, and, in turn, the packer collected from the fisherman. The amount of gasoline ordered by the packer from the appellant corresponded in every respect with the order placed by the fisherman with the packer. The fishermen in the Louisiana marshes, in carrying on their operations of catching shrimp and taking oysters were entirely dependent upon this source for their supply of gasoline. The appellant was under contract with the packers to carry a sufficient quantity of gasoline to supply the requirements of the business. There were over 100 boats in the Louisiana marshes engaged in catching shrimp and taking oysters, selling the same to Biloxi packers, and the Biloxi packers operated approximately 100 boats in transporting shrimp and oysters from the Louisiana waters to the packing plants at Biloxi, Mississippi. The packers, in purchasing the gasoline, intended the same to be shipped to Grant's Pass to supply the needs of the fishermen and for no other purpose, and the appellant, in filling orders, knew that the same was intended to go to Grant's Pass, La., and for no other purpose. The facts in respect thereto, as shown by the record were undisputed. Testimony of F. B. Royster (R. 31); L. O. Johnson (R. 44). While this testimony related to the associations of certain packers, the record contains the stipulation that the course of business was the same as to each sale (R. 51).

The volume of this business, as above outlined, constituted a well-established current of interstate commerce. The volume of business appears R. 17-30. The same extended over a period of approximately two years throughout the years from the first of January, 1926, and comprised approximately 1,000 sales of an aggregate value in excess of $500,000.

Section 2, Chapter 115, Mississippi Laws 1924 amending Section 2, Chapter 116, Mississippi Laws 1922 is as follows:

> "Sec. 2. Any person engaged in business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three cents (3c) per gallon upon the sale of gasoline by

such dealer in this state, except, however, such gasoline as is brought into this state and sold in original packages or otherwise in interstate commerce, or such as is purchased outside of the state and brought into this state in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer.

"Nor shall the distributor pay such tax when the same is paid by the retailer."

Section 2, Chapter 119, Mississippi Laws of 1926 is as follows:

"Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

Section 3, Chapter 119, Mississippi Laws, 1926, is as follows:

"Sec. 3. This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this state to another state or nation, nor to require the inclusion in the measure of tax any gasoline shipped in interstate commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another state or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this state. Provided, that distributors making shipments of

gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the state auditor of public accounts."

The appellant paid taxes to the state of Mississippi on all gasoline sold by it for purely domestic purposes at Biloxi, Mississippi, but took the position that as to the gasoline shipped to Grant's Pass, La., the transactions were interstate commerce, and such sales were not subject to state taxation. The state of Mississippi, through its attorney-general, filed suit in the chancery court of Harrison County, Mississippi, to recover the gasoline tax provided in said acts (R. 1-4).

The appellant, in its answer, denied liability therefor and claimed that the shipments were in interstate commerce, and that the Mississippi statutes taxing the sales of gasoline were unconstitutional and violative of the commerce clause of the constitution of the United States, if applicable to the sales in question (R. 12). The case was submitted on the pleadings and evidence hereinbefore set out, and the judge of said court held that the sales were in interstate commerce and not subject to taxation, and a final decree was entered dismissing the bill of complaint filed by the state of Mississippi, the decree being dated Feb. 7, 1928 (R. 51). An appeal was taken by the state of Mississippi to the supreme court of the state, and was submitted to Division B thereof composed of three judges. On June 11, 1928, the supreme court of the state of Mississippi affirmed the decree of the chancery court of Harrison County, Mississippi, dismissing the original bill of complaint (R. 52). The opinion was delivered by Mr. Justice Ethridge (R. 53), in which the following language was used:

"The decision of this case will turn upon the question whether this transaction constitutes interstate commerce.

"In the case of **United States v. Simpson,** 252 U. S. 465, 64 L. ed. 665, 45 S. C. 364, 10 A. L. R. 510, the Su-

preme Court of the United States held that, the transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, par. 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

"The indictment in that case charged that the defendant, being in the city of Cheyenne, Wyoming, 'bought, paid for, and owned,' 5 quarts of whiskey, and thereafter in his own automobile, driven by himself, transported it into the city of Denver, Colorado, intending there to devote it to his own personal use. Colorado prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The court decided that this transaction constituted interstate commerce within the meaning of such Act.

"There was a similar holding in the case of **United States v. Hill**, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. 143. In that case the indictment charged that Hill, on the 20th of November, 1917, being in the state of Kentucky, there intended to go and be carried by means of a common carrier, engaged in interstate commerce, from the state of Kentucky into the state of West Virginia, and intended to carry upon his person, as a beverage, for his personal use, a quantity of intoxicating liquor, to wit, one quart thereof, into the state of West Virginia, and did in the State of Kentucky purchase and procure a quantity of intoxicating liquor, to wit, one quart thereof, contained in bottles, and did then and there board a certain trolley car being operated by a common carrier corporation engaged in interstate commerce, and by means thereof did cause himself and the said intoxicting liquor, than upon his person, to be carried and transported in interstate commerce into

the state of West Virginia. It is charged that this was done in violation of the Act of Congress approved March 3, 1917, commonly known as the Reed Amendment, and that the transaction constituted interstate commerce."

A suggestion of error being filed by the state of Mississippi, the case was submitted for re-argument before Division A of the supreme court of the state of Mississippi, on November 12, 1928 (R. 59). The case was then determined by the full court consisting of six judges. An opinion was rendered December 22, 1928, reversing the judgment of affirmance theretofore had by the supreme court of the state of Mississippi, and entering a decree against the appellant for the statutory tax on the gasoline as shown by the proof in the case (R. 60). The opinion was delivered by Mr. Justice Anderson (R. 61), and will be found reported: **State ex rel Knox, Attorney-General v. Superior Oil Co.,** 119 So. 360. Judge Anderson used the following language:

"The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and purchase of gasoline between the appellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline as set out in the bills of lading therefor issued by the boat masters of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were

issued by the purchasers of the gasoline themselves, the packers, or to be more specific, by the masters of their boats, which amounted to the same thing."

Judge Anderson also used the following language:

"We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retains control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidentially on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out. It is true that the mere power of a shipper to divert a shipment already begun does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith, nor does a temporary interruption of the passage when reasonable and in furtherance of the intended transportation. **Hughes v. Minnesota,** 272 U. S. 468, 71 L. ed. 259; **Champlain Realty Company v. Brattleboro,** 260 U. S. 364, 67 L. ed. 309; **Railroad Company v. Mims** 111 Miss. 574, 71 So. 827. In **Browning v. Waycross, 233** U. S. 16, 58 L. ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a non resident manufacturer of such rods in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license without violating the commerce clause of the Federal Constitution, although such contracts bound the seller, at his own expense, to at-

tach them to the houses of the persons who ordered them. The court further held in that case that it was not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause'."

Judge Ethridge delivered a dissenting opinion (R. 68) concurred in by Mr. Justice Cook, which will be found 119 So. 363, using in part the following language:

"In **Dahnke-Walker Milling Co. v. C. T. Bondurant,** 257 U. S. 282, 66 L. ed. 239, the court expressly held that where goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as the transportation. In the opinion (257 U. S. 290, L. ed. 243), the court said:

" 'The commerce clause of the constitution, art. 1, sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat, 419, 446, 447, 6 L. ed. 678, 688, 689; **American Steel & Wire Co. v. Speed,** 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the com-

merce clause. Thus it was said in **Welton v. Missouri**, 91 U. S. 275, 280, 23 L. ed. 347, 349: "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities: In **Kidd v. Pearson**, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it is tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In **U. S. v. E. C. Knight Co.**, 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, "contracts to buy, sell or exchange goods to be transported among the several states" were declared "part of interstate trade or commerce." And in **Addyston Pipe and Steel Co. v. U. S.** 175 U. S. 211, 241, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportaion of persons and propery and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last'."

SPECIFICATION OF ERRORS INTENDED TO BE URGED

First. The Supreme Court of the State of Mississippi committed error in rendering the final judgment or decree against plaintiff in error, Superior Oil Company, upon the 22nd day of December, 1928, in the above-entitled cause.

Second. The Supreme Court of the State of Mississippi committed error in failing and refusing to affirm the judgment or decree rendered in favor of plaintiff in error herein by the Chancery Court of Harrison County, Mississippi, in said cause.

Third. The Supreme Court of the State of Mississippi committed error in holding that Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, were not contrary to and violative of Clause 3, Paragraph 8, Article 1 of the Constitution of the United States, known as the Commerce Clause.

Fourth. The Supreme Court of the State of Mississippi committed error in holding valid and enforcing against plaintiff in error (appellee before the Supreme Court of the State of Mississippi) sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115 Mississippi Laws of 1924.

Fifth. The Supreme Court of the State of Mississippi committed error in so construing Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, as to make same applicable to the sales of gasoline made by the Superior Oil Company, plaintiff in this case.

Sixth. The Supreme Court of the State of Mississippi committed error by its judgment or decree against the Superior Oil Company, plaintiff in error herein, in holding that the sales of gasoline in said cause made by the Superior Oil Company are intrastate commerce, and that the Superior Oil Company, plaintiff in error herein, was liable for the gallonage tax therefore provided by Chapter 119, Mississippi Laws of 1926, and Chapter 115, Mississippi Laws of 1924.

ARGUMENT

POINT I.

Jurisdiction

The appellant has heretofore complied with paragraph one rule twelve of this court by filing a statement of jurisdiction, with list of authorities sustaining the same.

In this case the appellant brought in question the constitutionality of the Mississippi statutes under review, by the assertion that such statutes violated the commerce clause of the constitution of the United States, if susceptible to construction that they required or justified the imposition of the tax therein provided on the sales of gasoline made by the appellant under the facts and circumstances disclosed in this case. The decision of the supreme court of the state of Mississippi was in favor of the validity of the act and applied and enforced the same as against the appellant.

The following authorities sustain the jurisdiction of the court:

Peoples of the State of New York v. Zimmerman, _____ U. S._____ 73 L. ed. 52; **Harold B. Fiske vs. State of Kansas,** 274 U. S. 380, 71 L. ed. 1108; **Di Santo v. Pennsylvania,** 273 U. S. 34, 71 L. ed. 524; **Peoples Nat. Gas Co. v. Public Service Com.,** 270 U. S. 550, 70 L. ed. 726; **Kansas City So. Ry. Co. v. Road Improvement Dist.** 266 U. S. 379, 69 L ed. 335; **Shafer v. Grain Co.** 268 U. S. 189, 69 L. ed. 909; **Eureka Pipe Line Co. v. Hallanan,** 257 U. S. 265, 66 L. ed. 227; **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239; **Lemke v. Farmers' Grain Co.** 258 U. S. 50, 66 L. ed. 458; **Kenney v. Sup. Lodge,** 252 U. S. 411, 64 L. ed. 638; **Wagner v. Covington,** 251 U. S. 95, 64 L. ed. 157; **Penn Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 43; **U. S. v. Simpson,** 252 U. S. 465; 64 L. ed. 665; **Kansas City Steel Co. v. State of Arkansas,** 269 U. S. 148, 70 L. ed. 204; **William Truax et al v. Corrigan,** 257 U. S. 312, 66 L. ed. 254; **Standard Oil Co. v. Graves,** 249 U. S. 389, 63 L. ed.

662; **U. S. v. Hill**, 248 U. S. 420, 63 L. ed. 337; **Western Union Tel. Co. v. Public Service Com.**, 247 U. S. 105, 62 L. ed. 1006; **Western Union Tel. Co. v. Lipscomb**, 244 U. S. 346, 61 L. ed. 118; **Penn. R. R. Com. v. Sonman Shaft Coal Co.** 242 U. S. 120, 61 L. ed. 188; **Rossi v. Pennsylvania**, 238 U. S. 62, 59 L. ed. 1201; **Kirmeyer v. Kansas**, 236 U. S. 568, 59 L. ed. 721; **Texas & N. O. Ry. Co. v. Sabine Tram Co.** 227 U. S. 111, 57 L. ed. 443; **Hanley v. Kansas City So. Ry. Co.**, 187 U. S. 617, 47 L. ed. 333; **American Express Co. v. Iowa**, 196 U. S. 133, 49 L. ed. 417; **Hannibal Ry. Co. v. Husen**, 95 U. S. 465, 24 L. ed. 427; **Philadelphia Ry. Co. v. Pennsylvania**, 82 U. S. 232, 20 L. ed. 146.

POINT II.

This Court will examine the record and determine for itself whether or not the Mississippi statutes complained of, as construed and enforced by the supreme court of the state of Mississippi, burden interstate commerce.

In the case of **A. & V. Ry Co. v. J. & E. Ry. Co.**, 271 U. S. 244, 70 L. ed. 928, the court used the following language:

> "It is true that in this case the state court found that the place selected for the junction was a proper one. But the power to make the determination whether state action will obstruct interstate commerce inheres in the United States as an incident to its power to regulate such commerce."

In the case of **K. C. Structural Steel Co. v. State of Arkansas**, 269 U. S. 148, 70 L. ed. 204, the court used the following language:

> "The supreme court of Arkansas held that the things done by plaintiff in error before August 17, 1921, constituted intrastate business in Arkansas. But the plaintiff in error contends that all was interstate commerce. We accept the decision of the supreme court of Arkansas as to what constitutes the doing of business in that state

within the meaning of its own laws. **Georgia v. Chattanooga,** 264 U. S. 472, 483, 68 L. ed. 796, 800, 44 Sup. Ct. Rep. 369. But this court will determine for itself whether what was done by plaintiff in error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause. Plaintiff in error cites **Dahnke-Walker Mill v. Bondurant,** 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106. It was there held that, 'Such commerce (among the states) is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse.' (p. 290) and that, 'A corporation of one state may go into the latter, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause' (p. 291). In that case, a Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purpose of wheat to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. It was held that the transaction was interstate commerce, notwithstanding the contract was made and was to be performed in Kentucky. All the things done in Kentucky had reference to and were included in the interstate transaction."

In **LaCoste v. Department of Conservation,** 263 U. S. 545, 68 L. ed. 437, this court used the following language:

"This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form. **Looney v.**

Crane Co., 245 U. S. 178, 189 et seq. 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; **Kansas City Ft. S. & M. R. Co. v. Botkin** 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; **St. Louis Southwestern R. Co. v. Arkansas**, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; **U. S. Exp. Co. v. Minnesota**, 223 U. S. 335, 346, 56 L. ed. 459, 465, 32 Sup. Ct. Rep. 211; **Galveston H. & S. A. R. Co. v. Texas**, 210 U. S. 217, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

Other authorities are **Interstate Amusement Co. v. Albert**, 239 U. S. 560, 60 L. ed. 439; **Truax v. Corrigan**, 257 U. S. 312, 66 L. ed. 254, **Fiske v. Kansas**, 274 U. S. 380, 71 L. ed. 1108.

POINT III.

A state cannot, under the commerce clause of the constitution of the United States, tax interstate commerce in any form.

Brown v. Maryland, 12 Wheat, 420, 6 L. ed. 678; **Philadelphia R. R. Co. v. Pennsylvania**, 82 U. S. 232, 21 L. ed. 146; **Western Union Tel. Co. v. Texas**, 105 U. S. 460, 26 L. ed. 1067; **Moran v. City of New Orleans**, 112 U. S. 69, 28 L. ed. 653; **Gloucester Ferry Co. v. Pennsylvania**, 114 U. S. 196, 29 L. ed. 158; **Crutcher v. Kentucky**, 141 U. S. 47, 35 L. ed. 649; **Galveston Ry. Co. v. Texas**, 210 U. S. 217, 52 L. ed. 1031; **Western Union Tel. Co. v. Kansas**, 216 U. S. 1, 54 L. ed. 355; **Crenshaw v. State**, 227 U. S. 389, 57 L. ed. 565; **Rogers v. Arkansas**, 227 U. S. 401, 57 L. ed. 569.

The latest case upon the subject is that of **Helson et al v. Commonwealth of Kentucky**_____U. S._____, 73 L. ed. 337, decided April 8, 1929.

POINT IV.

The sale and delivery of gasoline by appellant in this case, according to the established course of dealing, was in a regular channel of interstate commerce, and formed an integral part thereof.

A.

What Constitutes Interstate Commerce

In the case of **William Adair v. U. S.** 208 U. S. 161, 52 L. ed. 436, the court used the following language:

> "Let us inquire what is commerce, the power to regulate which is given to Congress?
>
> "This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the teansit of persons, and the transmission of messages by telegraph,—indeed every species of commercial intercourse among the several states, —but not that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states'."

In Note, **U. S. v. Simpson,** 252 U. S. 465, 64 L. ed. 665, 10 A. L. R. 512, the following rule is announced:

> "There are two elements involved in the idea of commerce, viz., trade and transportation. Commerce has been defined to be 'a term of the largest import. It comprehends intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities, between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted.' **Welton v. Missouri** (1876) 91 U. S. 275, 23 L. ed. 347. The United States Supreme Court, speaking of interstate commerce, says that 'commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and

transit of persons and property as well as the purchase and sale and exchange of commodities.' **Mobile County v. Kimball** (1881) 102 U. S. 691, 26 L. ed. 238. Again, it has been stated that 'commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.' **Gloucester Ferry Co. v. Pennsylvania** (1885) 114 U. S. 196, 29 L. ed. 158, 1 Inter. Com. Rep. 382, 5 Sup. Ct. Rep. 826."

B

Interstate Commerce Comprises not only Shipments but Negotiations and Contracts in Respect thereto.

In the case of **Dahnke-Milling Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239, the plaintiff went into the State of Kentucky and made a contract with a citizen of the latter state, whereby the citizen of Kentucky was to prepare and deliver, f.o.b. cars in Kentucky, certain grain to be shipped to the plaintiff in the State of Tennessee. There was a breach of the contract, and the plaintiff, the purchaser, filed suit for damages. The state court held that the failure of the plaintiff corporation to file a copy of its charter, as required by the Kentucky statutes, rendered the contract unenforceable. The Supreme Court of the United States held that the act of buying in the State of Kentucky was a step in interstate commerce and the state statute was void, using the following language:

"Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat. 419, 446, 6 L. ed. 678, 688, 689;

American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principal, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as often as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus, it was said in **Walton v. Missouri,** 91 U. S. 275, 23 L. ed. 347, 349: 'Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In **Kidd v. Pearson,** 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In **U. S. v. E. C. Knight Co.** 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'Contracts to buy, sell or exchange goods to be transported among the several states' were declared 'part of interstate trade of commerce.' And in **Addyston Pipe & Steel Co. v. United States,** 174 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 95, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, and also, the purchase, sale and exchange of commodities. In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

The direct question was presented in the case of **Lemke v. Farmers' Grain Co.,** 258 U. S. 50, 66 L. ed. 458. In that case,

the defendants in error were operating a series of grain elevators in the state of North Dakota, where grain was produced with a view to being resold. A small portion thereof was sold in the state of North Dakota, but the greater portion thereof was sold and shipped out of the state. The state of North Dakota passed an act regulating the operation of the state elevators. An injunction was obtained in the United States court on the ground that the act was an interference with interstate commerce. The Federal court in North Dakota so held, and the supreme court of the United States sustaining the decree, used the following language:

> "That such course of dealing constitutes interstate commerce, there can be no question. The court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. **Dahnke & Walker Mill Co. v. Bondurant,** decided Dec. 12, 1921, (257 U. S. 282, ante, 239, 43 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into the state of Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the state. The court rejected the conclusion of the state court, and held that the buying, no less than the selling, was a part of interstate commerce, committed to national control by the federal constitution. Applying the principle of that decision, and the previous decisions in this court, cited in the opinion, the complaint's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect of control and burden interstate commerce."

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between a definition of interstate commerce, where the right of state taxation was involved, or manufacture or commerce of an interstate character was subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. **Swift & Co. v. U. S.** 196 U. S. 376, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; **Eureka Pipe Line Co. v. Hallanan** decided by this court Dec. 12, 1921, (257 U. S. 265, ante, 227, 42 Sup. Ct. Rep. 101); and **U. S. Fuel Co. v. Hallanan,** decided the same day, (257 U. S. 277, ante, 234, 42 Sup. Ct. Rep. 105)."

In the case of **Rosenberger v. Pacif. Exp. Co.,** 241 U. S. 48, 60 L. ed. 880, the court used the following language:

"But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the constitution, and which in its fundamental aspect

has undergone no change or suffered no deviation; that is, that the interstate commerce which is subject to the control of congress embraces the widest freedom, including, as a matter of course, the right to make all contracts having a proper relation to the subject."

In the case of **Federal Trade Commission v. Pacific States P. T. Asso.**, 273 U. S. 52, 71 L. ed. 534 the court used the following language:

"The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' **Swift & Co. v. United States,** 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. **Dozier v. Alabama,** 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L. R. A. (n. s.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. **Dahnke-Walker Mill. Co. v. Bondurant,** 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers' Grain Co.,** 258 U. D. 50, 55, 66, L. ed. 458, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser

from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. **Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)** 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. **Dozier v. Alabama,** supra; **Western U. Teleg. Co. v. Foster,** 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278; P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; **Lemke v. Farmers Grain Co.** supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

In the case of **Foster Fountain Packing Co. v. Haydel,** --------U. S.---------, 73 L. ed. 1, the court used the following language:

"In determining what is interstate commerce, courts look to practical considerations and the established course of business. **Swift & Co. v. United States,** 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; **Lemke v. Farmers Grain Co.,** 258 U. S. 50, 59, 66 L. ed. 458, 42 Sup. Ct. Rep. 244; **Binderup v. Pathe Exch.,** 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; **Shafer v. Farmers Grain Co.,** 268 U. S. 189, 198, 200, 69 L. ed. 909, 914, 915, 45 Sup. Ct. Rep. 481. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among the states. And a state statute that operates directly to burden any of its essential elements is invalid. **Dahnke-Walker Mill Co. v. Bondurant,** 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Shafer v. Farmers Grain Co.,** supra; 199 (69 L. ed. 914, 45 Sup. Ct. Rep. 481).

C

Interstate Commerce not dependent upon passage of title, neither does the same necessarily involve transportation by carrier.

Judge Anderson, who delivered the majority opinion for the supreme court of the state of Mississippi (119 Sou. 361), used the following language:

> "The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass, in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and the purchase of gasoline between the appellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline, as set out in the bills of lading therefor issued by the boat master of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing."

It is perfectly apparent that the supreme court of the state of Mississippi, in the majority opinion, was of the opinion that the question of whether or not the transactions involved were interstate commerce turned upon the question of passage of title. Such conception totally overlooked the principles underlying interstate commerce. The position of the supreme

court of the state of Mississippi is based upon the hypothesis that interstate commerce includes only the transportation and completely leaves out of account the fact that interstate commerce protected the negotiations leading up to the sales, and the sales themselves. The tax sued for and recovered in this case is not one laid upon the privilege of conducting a business within the state of Mississippi such as was involved in **Browning v. Waycross**, 233 U. S. 16, 58 L. ed. 829. The tax in this case was one imposed upon each separate sale itself. There could be no sale without a contract of purchase, and the negotiations, as well as the contract of purchase, were just as much part of interstate commerce as the transportation itself.

There are two viewpoints from which interstate commerce must be determined. One view is commerce coming into a state. The authorities are well settled that when property is stored or comes to rest and forms a part of the property of the state, its interstate character is at an end, and the property is subject to taxation. **Woodruff v. Parham**, 8 Wallace, 123, 19 L. ed. 382; **Brown v. Houston**, 114 U. S. 622, 29 L. ed. 257, **American Steel & Wire Co. v. Speed**, 192 U. S. 500, 48 L. ed. 538; **Sonneborn Bros. v. Keeling**, 262 U. S. 506, 67 L. ed. 1095.

Upon the other hand, where goods are received into a state on orders previously received and delivered, in unbroken packages, such transactions are interstate commerce, and the subject of sale is not liable to a state excise tax. **Standard Oil Co. v. Graves**, 249 U. S. 389, 63 L. ed. 662; **Askren v. Continental Oil Co.**, 252 U. S. 444, 64 L. ed. 654; **Bowman v. Continental Oil Co.**, 256 U. S. 642, 65 L. ed. 1139.

In the instant case, however, the transactions involved commodities moving out of the state, and the rule is that from the moment the interstate movement begins, the commodity is not subject to local taxation.

As to the right of the state to tax property moving out of the state in interstate commerce, it was announced in the case of **Coe v. Errol**, 116 U. S. 517, 29, L. ed. 715, that the commod-

ity sought to be taxed must have started on its interstate journey. It must be borne in mind that that case did not involve an excise or occupation tax but there was what is known as an ad valorem assessment against the property itself, or, in other words, a property tax.

The same rule was applied as to a property tax. **Union Refrigeration Transit Co. v. Lynch,** 177 U. S. 149, 44 L. ed. 708; **American Refrigeration Transit Co. v. Hall,** 174 U. S. 70, 43 L. ed. 899. In those cases the court held that both the cars were instruments of interstate commerce since an average number of them were present in the state as property during each year they had a local status rendering them subject to a property tax.

Section 112 Mississippi state constitution contains the following language:

> "Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value."

Excise or occupation taxes are not within the section. **Clarksdale Ins. Agency v. Cole,** 87 Miss. 637, 40 So. 228; **Daily v. Swope,** 47 Miss. 367. The sales of gasoline, however, such as are involved in this case, under Mississippi statutes, are intended as an excise or occupation tax. **Panhandle Oil Co. v. State,** 147 Miss. 663, 112 So. 584. In other words, the tax in question is a tax, not upon property owned by the appellant in the state of Mississippi. Appellant would be liable for and doubtless paid taxes on all property which it owned as of the taxable date in the state. The tax, however, involved in this case is upon the sale itself, that is to say, it is admitted that the gasoline was sold in the regular course of business for the purpose of being immediately transported out of the state, carried into and consumed in a regular channel of interstate commerce; still it is not the property situated in Mississippi which is taxed, but the sale itself, and, we submit to the court that there is a very obvious distinction between a property

tax against specific property itself situated in the state, and the right to make a sale. Even if it be conceded, for the sake of argument, that the appellant parted with all title and its responsibility was at an end when it delivered the gasoline to the packer's boat at the wharf at Biloxi, the purchase by the packer, the sale by the appellant, the preparation of the same for delivery, and the delivery thereof, was interstate commerce, not subject to excise tax.

Reverting to our pronouncement that the question of interstate commerce is not to be determined upon the question as to whether and when the legal title passes, in the case of **Hannibal R. R. Co. v. Husen,** 95 U. S. 465, 24 L. ed. 527, the court held that the owner of cattle driving the same through and across the state of Texas into another state, was engaged in interstate commerce and not subject to state regulation.

In the case of **Kelly v. Rhoades,** 188 U. S. 1, 47 L. ed. 359, the owner of a herd of 10,000 sheep drove them from Utah through the state of Wyoming, on the way to Nebraska for the purpose of selling the sheep. They traveled about nine miles per day, grazing somewhat in their onward travel. The statutes of Wyoming levied a tax upon cattle grazing. The state court held that the owner was liable therefor. On appeal to this court it was held that they were moving in interstate commerce and not subject to state taxation.

The case of **T. & N. R. R. Co. v. Sabine, Tram Co.,** 227 U. S. 111, 57 L. ed. 442, is in point. In that case lumber was shipped from an interior point in Texas, to Galveston, and was billed to the purchaser thereof, who immediately upon obtaining the bill of lading, unloaded the lumber from the cars and had the same loaded on a ship. Such movement was within the intention of the parties at the time of the shipment. This court held that the movement was interstate commerce, using the following language:

"The facts in the case at bar are different. The lumber was ordered, manufactured, and shipped for export.

> And we say 'shipped,' for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one, and did not change the relation of the Powell Company to it, and make the lumber other than lumber purchased at Ruliff, and started from there in transportation to a foreign destination. The findings are explicit and circumstantial as to this. And the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transhipment at Sabine. **Swift & Co. v. United States,** 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

In the case of **U. S. v. Benson,** 234 U. S. 548, 58 L. ed. 1459, the court held that interstate pipe lines belonging to oil companies and transporting oil owned by such companies was interstate commerce, and subject to congressional action. The court used the following language:

> "The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. **Rearick v. Pennsylvania,** 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159. See **Texas & N. O. R. R. Co. v. Sabine Tram Co.,** 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229. The situation that we have described would make it illusory to deny the title of commerce to such transportation.

beginning in purchase and ending in sale, for the same reasons that make it transportation within the act."

In **Pennsylvania Ry. Co. v. Sonman,** 242 U. S. 120, 61 L. ed. 188, this court held that the delivery of coal on cars f.o.b. the mines destined to points outside the state was interstate commerce. In other words, although the title passed out of the seller to the buyer, on delivery to the carrier, since the property was intended to be conveyed from one state to another, the shipment was in interstate commerce, and not subject to state regulation.

In **Western Union Teleg. Co. v. Foster,** 247 U. S. 105, 62 L. ed. 1006, this court held that the transmission of market quotations by telegraph from New York to Boston was interstate commerce, not subject to state regulation in the receiving state; that the interstate commerce was to be determined by practice, intent, typical course and not title, using the following language:

> "Thus, lumber purchased in Texas for the purchase of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. **Texas & N. O. R. Co. v. Sabine Tram Co.,** 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229. Practice, intent, and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in **Railroad Commission v. Texas & P. R. Co.,** 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837, and is too well settled to need to be further sustained. **Western Oil Ref. Co. v. Lipscomb,** 244 U. S. 346, 349, 61 L. ed. 1181, 1183, 37 Sup. Ct. Rep. 623. See **Swift & Co. v. U. S.,** 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276."

Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 67 L. ed. 309. In that case the owner of logs put them in a river for the purpose of shipping the same in interstate commerce.

Owing to obstruction in navigation, the passage of the logs was stopped for some time. The court held that the logs started in interstate commerce and were not subject to taxation, using the following language:

> "The interstate commerce clause of the constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. **State, Dermold, Prosecutor v. Engle,** 34 N. J. L. 425, 435; **State, Lehigh & W. Coal Co. Prosecutor v. Carrigan,** 39 N. J. L. 36. This was the case in **Kelly v. Rhoades,** 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259, in which sheep driven 500 miles from Utah to Nebraska, which traveled 9 miles a day, were held immune from taxation in Wyoming, where they stopped and grazed on their way."

In the case of **Hughes Bros. v. Minnesota,** 272 U. S. 469, 71 L. ed. 359, the court held that logs when placed in a river for shipment, and the ice melted, and they began to move down the stream, had started in interstate commerce and were not subject to taxation. The court used the following language:

> "Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more diffi-

cult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the Champlain Co. case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain Co. case."

This case is even stronger in that the tax is one upon the sale itself and not a property tax. Besides the gasoline started on its interstate journey as it was drawn from storage tanks and placed in sealed drums. While it may have been within the range of possibility that the purchaser might have diverted the shipment, the amount ordered corresponded as to quantity with the requirements of the fishermen in the Louisiana marshes. Upon the other hand, from the time the gasoline was drawn from the tank into sealed drum, there was one continuous movement. We must bear in mind again that the tax was upon the sale, and to state the case most strongly for the state of Mississippi, the sale was not completed until the sealed drums containing gasoline were placed on the wharf at the water's edge.

In **Ozark Pipe Line v. Monier**, 266 U. S. 555, 69 L. ed. 439, it was held that a pipe line transporting crude oil from one state to the other was not subject to an excise tax. The court used the following language:

"The tax is one upon the privilege or right to do business (**State ex rel. Marquette Hotel Invest. Co. v. State Tax Commission**, 282 Mo. 213, 234, 221 S. W. 721); and if appellant is engaged only in interstate commerce, it is con-

ceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form,—whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. **Leloup v. Mobile,** 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; **Kansas City, Ft. S. & M. R. Co. v. Botkin,** 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond power of state taxation. **Eureka Pipe Line Co. v. Hallanan,** 257 U. S. 265, 272, 66 L. ed. 227, 231, 42 Sup. Ct. Rep. 101; **United Fuel Gas Co. v. Hallanan,** 257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105."

In the case of **Pennsylvania Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 434, and in the case of **Pennsylvania v. West Virginia,** 262 U. S. 553, 67 L. ed. 1117, it is held that the transmission of gas from one state to another was interstate commerce and not subject to state regulation. The question of ownership was unimportant. The question of medium is equally as unimportant.

United States v. Hill, 248 U. S. 420, 63 L. ed. 337. In this case it is held that the transportation of intoxicating liquor upon the person of one being carried in interstate commerce is in itself interstate commerce. The court used the following language:

"The constitution confers upon congress the power to regulate commerce among the states. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. **Gibbons v. Ogden,** 9 Wheat. 1, 188, 6 L. ed. 23, 68; **Gloucester Ferry Co. v. Pennsylvania,** 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. 'Importation'

into one state from another is the indispensable element—the test—of interstate commerce. **International Textbook Co. v. Pigg,** 217 U. S. 91, 107, 54 L. ed. 678, 685, 27 L. R. A. (n. s.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; **The Lottery Case** (Champion v. Ames) 188 U. S. 321, 345, 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of congress. **Pipe Line Cases** (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words, 'interstate commerce.' U. S. v. Chavez, 228 U. S. 525, 532, 57 L. ed. 950, 952, 33 Sup. Ct. Rep. 595."

The rule was reaffirmed in the case of **U. S. v. Simpson,** 252, U. S. 465, 64 L. ed. 665, 10 A. L. R. 510, and in the note in the last above mentioned case the following authorities are cited:

"It seems clear that the mere fact that articles are carried in private conveyances does not prevent the transaction becoming interstate commerce. For example, in **Kirmeyer v. Kansas,** (1915) 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419, the business carried on within the state of Kansas by a liquor dealer who maintained an office and warehouse in a small town on the Missouri side of the Missouri river, connected by a bridge with Leavenworth, Kansas, and who filled all orders for liquor for Kansas customers by delivery from such warehouses in his own horse-drawn wagon, either directly or by hauling the liquor to the Leavenworth railway depots for transportation to other Kansas points, all mail orders from Kansas customers being carried across the river before being opened, and all liquor received by him at the railway depots in Leavenworth, though destined for Kansas customers, being first hauled by him to his warehouse across the river,

was held to be interstate commerce. The fact that such dealer was a citizen of Kansas, who, having long carried on an illegal liquor trade in Leavenworth, moved his business across the river to evade the Kansas prohibitory laws, without changing his residence, or removing from Leavenworth the wagons and teams used by him in conducting the business, was held not to prevent this being interstate commerce.

"The fact that goods are transported in the owner's conveyance is not conclusive that it is not interstate commerce. Thus, the transportation of oil through various states by means of a pipe line has been held to be interstate commerce, although the oil belongd to the owner of the line, where this oil was purchased by the owner and was transported for the purpose of being sold. **Pipe Line Cases** (U. S. v. Ohio Oil Co.) (1914) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956. The pipe lines, although not technically common carriers, yet were carrying all oil offered, if only the officers would sell at the price fixed by the owner of the pipe lines. It is laid down as a general principle in this case that the fact that the oil transported belonged to the owner of the pipe line is not conclusive against the transportation being interstate commerce. The transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce. **Pennsylvania Gas Co. v. Public Service Commission** (1920) 252 U. S. 23, 64 L. ed._____P. U. R. 1920 E, 18, 40 Sup. Ct. Rep. 279. A railroad company engaged in hauling its own rails upon its construction train, both locally and across the state lines, is engaged in interstate commerce so as to bring it within the Federal Safety Appliance Act. **United States v. Chicago, M. & St. P. R. Co.** (1906) 149 Fed. 486."

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. ed. 227, is directly in point. In that case oil was assembled from

various producers by a pipe line company, and delivered to it for transmission. The larger portion of it flowed out of the state, but the pipe line company determined the destiny of the oil, and a portion of it was delivered in the state of Virginia. Upon the delivery of the oil to the pipe line company, the producer received credit on the books of the pipe line company therefor. This court used the following language:

> "As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax, to be valid, 'must not, in its practical effect and operation, burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have change the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the desination of any specific oil. Therefore, its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

In **Brooks v. U. S.**, 267 U. S. 432, 69 L. ed. 699, it was held that the interstate transportation by a motor vehicle by a person who knew the same to have been stolen, was interstate commerce, and a violation of the National Motor Vehicle Theft Act. The court used the following language:

> "In **Hoke v. U. S.**, 227 U. S. 308, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905, and **Caminetti v. United States**, 242 U. S. 470, 61 L. ed. 442, L. R. A. 1917 F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas, 1917B, 1168, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one state to another for immoral purposes or otherwise, was valid because it was intended to prevent

the use of interstate commerce to facilitate prostitution or concubinage and other forms of immorality."

The case of **Peoples Natural Gas Co. v. Public Service Commission,** 270 U. S. 550, 70 L. ed. 726, is directly in point. This court held that the transportation of gas through the state of Virginia by a pipe line, and the delivery to the purchaser at the state line through a meter, was interstate commerce, and not subject to state regulation, using the following language:

> "As respects the West Virginia gas we are of the opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point, and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. **Western U. Tel. Co. v. Foster,** 247 U. S. 105, 112, 113, 62 L. ed. 1006, 1015, 1016. 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; **Public Utilities Commission v. Landon,** 249 U. S. 236, 245, 63 L. ed. 577, 586, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268; **Penn. Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 434, 441, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279; **United Fuel Gas Co. v. Hallanan,** 257 U. S. 277, 280, 66 L. ed. 234, 238, 239, 42 Sup. Ct. Rep. 105; **Pa. v. W. Va.** 262, U. S. 553, 67 L. ed. 1117, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658; **Binderup v. Pathe Exch.** 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; **Missouri ex rel Barrett v. Kansas Natural Gas Co.,** 265 U. S. 298, 68 L. ed. 1027, 44 Sup. Ct. Rep. 544, **Ohio R. R. Com. v. Worthington,** 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653, **Lemke v. Farmers Grain Co.,** 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244, **Shafer v. Farmers Grain Co.,** 268 U. S. 189, 69 L. ed. 909, 45 Sup. Ct. Rep. 481."

The essential facts are that here was a continuous flow of gasoline from the state of Mississippi into the state of Louisiana to be used in the latter state. The question is not presented of an occasional or an isolated sale. Upon the other hand we have a well-established course of business carried on in a practical manner. Suppose that the seller in its own conveyances had contracted to sell and deliver the gasoline at Grant's Pass. That such course of business would have constituted interstate commerce cannot be questioned. Suppose that there had been a regular carrier either by land or water transporting property to Grant's Pass and the contract of sale had required the seller to deliver the commodity to such carrier. Title would have passed to the buyer upon delivery to the carrier.

United States v. Andrews & Co., 207 U. S. 229, 28 Sup. Ct. Rep. 100 **Hatch v. Standard Oil Co.**, 100 U. S. 124. **Halliday v. Hamilton,** 11 Wall. 560; **The Mary & Susan,** 1 Wheat. 25; **The Frances,** 9 Cranch. 183. Yet the transactions would have been in interstate commerce although the title may have passed in the state of Mississippi. Interstate commerce does not depend upon the question of the passage of title or the medium of conveyance. The essential characteristics of interstate commerce are the negotiations, the contract of purchase and the transportation in interstate commerce. That the gasoline was required to be carried from the state of Mississippi into the state of Louisiana in order to meet the requirements of fishermen is unquestioned. The movement was not the sole ingredient of interstate commerce. The negotiations, purchase and delivery at the water's edge were essential and integral parts of the interstate commerce. In other words, there could have been no transportation without the negotiations, the contract of purchase and the delivery at the water's edge.

In the case of **Helson v. Commonwealth of Kentucky,** supra, the Kentucky statute imposed a tax upon the use of gasoline, and the plaintiff operated a ferry between Illinois and Kentucky,, three-fourths of the trip taking place in Ken-

tucky. The state court decided, however, that the use of gasoline in the state in the operation of the boat was not interstate commerce, using the following language:

> "And it is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of congress to regulate that portion of commerce between the states.' **Glocucester Ferry Co. v. Pennsylvania,** supra, page 214."

So in this case there could have been no transportation from the state of Mississippi into the state of Louisiana except as a result of negotiations, contracts of purchase, preparation for delivery and delivery. These things were just as much part of the interstate commerce as the transportation itself and cannot be separated therefrom. The fishermen of the state of Louisiana who desired gasoline were unable to produce the same, nor were the packers able to do so. They were dependent for their source of supply on obtaining the required gasoline by purchase. The amount purchased was the exact amount required to be taken to the state of Louisiana, and the purchase was just as an essential portion of the interstate commerce as the transportation. It is just this conception which the decision of Judge Anderson of the supreme court of the state of Mississippi overlooks. The usual effort was made to divide the transaction into sealed compartments and separate as totally disconnected from the transportation that part which took place in the state of Mississippi. This cannot be done.

Interstate commerce is, as we shall show the court, a practical proposition, depending upon not the technical niceties of title, but the usual course of business. What was done in order to meet the requirements of the fishermen cannot be separated on the instalment plan and allocate entirely to Mississippi a given portion thereof as being disconnected from the interstate movement. The requirements of interstate commerce, the negotiations, the purchase and the means of transportation are constantly changing in order to meet the commercial requirements of a rapidly developing industrial structure. A man picks up a telephone receiver in one state and communicates with a citizen in another state on a matter of business. Or such person sends a telegram from one state to another; or an individual stands at a radio broadcasting station, advertises his wares into other states, negotiates and invites contracts for purchase or sale or sells the products of his brain either in song or story to the public in other states. All of these things are interstate commerce and are not subject to state taxation.

In the case of **Rossi v. Pennsylvania,** 238 U. S. 62, 59 L. ed. 1201 it was held that a privilege tax may not be imposed upon the solicitation of sales of intoxicating liquors in one state to be shipped in fulfillment of orders taken in another state. This rule is based upon the philosophy that the commerce clause of the constitution of the United States protects from state control not only the transportation of property but the solicitation of orders.

The case of **Dahnke-Walker Mill. Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239 is directly in point. There a resident of Tennessee went into Kentucky and made a contract for the purchase and shipment of grain from the state of Kentucky into the state of Tennessee. The seller was to deliver the grain on board cars for the buyer. Payment was to be had in the state of Kentucky. Title would pass to the buyer upon delivery in the state of Kentucky. The buyer intended to ship the wheat out of the state of Kentucky, and such action constituted the usual course of business. This court held the transaction

was in interstate commerce and not subject to state regulation, using the following language:

> "Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688, 689; **American Steel & Wire Co. v. Speed,** 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in **Welton v. Missouri** 91 U. S. 275, 280, 23 L. ed. 347, 349; ' "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In **Kidd v. Pearson,** 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the transportation incidental thereto constitutes commerce.' In **U. S. v. E. C. Knight Co.,** 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in **Addyston Pipe & Steel Co. v. U. S.,** 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and

includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

In **Davis v. Farmers Coop. Assn.**, 262 U. S. 312, 67 L. ed. 996, it was held that solicitation of traffic by agents of a railroad company of a state remote from their lines is part of the business of interstate commerce and not subject to state regulation.

In **Spalding v. Edwards**, 262 U. S. 261, 67 L. ed. 865, a broker received orders from a foreign country for certain goods. On its own account it ordered the goods from plaintiff in error, and directed plaintiff in error to deliver the goods to an exporting navigation company. This the plaintiff in error did, taking receipts therefor in the name of the broker. The broker in turn exchanged the receipts for export bills of lading. The title passed at the moment that the goods were delivered to the carrier, although subsequent to the time the broker exchanged the receipts for bills of lading. This court held that the transaction was interstate commerce and not subject to the tax sought to be imposed thereupon, using the following language:

"The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would set to sea does not matter, so long as

they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co., and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co., was solely for the purpose of Delgado & Co., and for their account and risk. Theoretical possibilities may be left out of account. In **R. R. Com. v. Texas & P. R. Com.**, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the state made no difference. The same principle was applied in **Texas & N. O. R. Co. v. Sabine Tram Co.**, 227 U. S. 111, 123, 57 L. ed. 442, 447, 33 Sup. Ct. Rep. 229. The overt act of delivering the goods to the carrier marks the point of distinction between this case and **Cornell v. Coyne**, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seeen in **Thames & M. Marine Ins. Co. v. U. S.**, 237 U. S. 19, 50 L. ed. 821, 35 Sup. Ct. Rep. 496. Ann. Cas. 1915 D 1087."

Flanagan v. Federal Coal Co., 267 U. S. 222, 69 L. ed. 583 was directly in point. In that case the plaintiff contracted to sell and the defendant to buy certain coal to be delivered f. o. b. cars Tracey City, Tennessee. Seller to deliver the coal in the state of Tennessee, taking bills of lading in the name of Federal Coal Co., and consign the coal to the buyers customers in other states. This court held that the transaction was in interstate commerce, using the following language:

"There was some discussion below to show that Flanagan also bought this coal as a dealer, and so was subject to the law in respect of this transaction. But for the pres-

ent purpose it is immaterial how he came by what he sold. For if he was engaged in interstate commerce, he could not be impeded because he was a dealer, any more than if he was selling from his own mine. It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other states. Very likely the Federal Coal Co., might have stopped the coal at Tracey City, in Tennessee, but it had no thought of doing so, and Flanagan understood the course of business in which he was expected to cooperate and did cooperate. Therefore in this matter the parties were engaged in interstate commerce, and the state law even if valid as a tax could not invalidate their contract. **Dahnke-Walker Mill. Co. v. Bondurant**, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers Grain Co.**, 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244; **A. G. Spalding & Bros. v. Edwards**, 262 U. S. 66, 69, 70, 67 L. ed. 865, 867, 868, 43 Sup. Ct. Rep. 485. We see no sufficient reason for believing that the decision would have been the same if the state court had regarded the transactions as interstate commerce, and therefore its decision must be reversed."

Federal Trade Com. v. Pac. States Assn., 273 U. S. 52, 71 L. ed. 534 is directly in point. That was a suit by the Federal Trade Commission to prevent carrying out of certain trade agreements in violation of the Federal anti-trust laws. In order to bring about uniformity of price in various states, the manufacturer or wholesaler would sell the commodity,—in that case paper,—to a local dealer in its own state, and the local dealer would, in turn, ship the same to a customer or manufacturer outside of the state. This court held that the transaction was in interstate commerce, using the following language:

"The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and

to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical, legal conception but a practical one, drawn from the course of business.' **Swift & Co. v. U. S.**, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. **Dozier v. Alabama**, 218 U. S. 124, 128, 54 L. ed. 935, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. **Dahnke-Walker Mill. Co. v. Bondurant**, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers Grain Co.**, 258. U. S. 50, 55, 66, L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business, completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. **Sonneborn Bros. v. Cureton** (Sonneborn Bros. v. Keeling) 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. **Dozier v. Alabama**, supra; **Western U. Tel. Co. v. Foster**, 247 U. S. 105, 113, 62 L. ed. 1006, 1015; 1 A. L. R. 1278, P. U. R. 1918 D, 865, 38 Sup. Ct. Rep. 438; **Lemke v. Farmers Grain Co.**, supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction

one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

In **Di Santo v. Pennsylvania,** 273 U. S. 34, 71 L. ed. 524, the State of Pennsylvania placed a privilege tax upon the occupation of soliciting interstate passengers and the sale of steamship tickets to other states and foreign countries. This court held that the tax was upon interstate commerce and void.

In **Public Utilities Commission v. Attleboro,** 273 U. S. 83, 71 L. ed. 549, the court held that the transmission of electricity from one state to another is interstate commerce, although the custody and title are transferred from vendor to purchaser at the state boundary.

The case of **Panhandle Oil Co. v. State of Mississippi,** 277 U. S. 218, 72 L. ed. 857, is necessarily fatal to the contention of the state of Mississippi in this case. In that case the supreme court of Mississippi was called upon to construe the identical statutes herein involved, which were sales to the United States government. This court held that the tax was on the sale itself, and, therefore, exacted tribute from the United States government. The court used the following language:

"The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the National government under the constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. **Wagner v. Covington,** 251 U. S. 95, 102, 64 L. ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the

seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. **M'Culloch v. Maryland,** supra, 436, (4 L. ed. 608); **Gillespie v. Oklahoma,** supra, 505; (66 L. ed. 340, 42 Sup. Ct. Rep. 171); **Jaybird Min. Co. v. Weir,** 271 U. S. 609, 613, 70 L. ed. 1112, 1114, 46 Sup. Ct. Rep. 592. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. **Western U. Teleg. Co. v. Texas,** 105 U. S. 460, 26 L. ed. 1067; **Frick v. Pennsylvania,** 268 U. S. 473, 494, 69 L. ed. 1058, 1064, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603. And it is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state."

In **Crutcher v. Kentucky,** 141 U. S. 47, 35 L. ed. 649, this court used the following language:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right unless congress should see fit to interpose some contrary regulation on the subject."

That is to say, the same rule as was announced in the **Panhandle Oil Co.,** case is true here. The right to engage in in-

terstate commerce does not come from the state law, and it can lay no tribute thereupon either directly or indirectly. The tax in this case is not an inspection tax provided in pursuance of the state's duty to protect its citizens, but is one for raising of revenue to construct public highways. In this connection the case of **Foster Fountain Packing Co. v. Haydel,**_____U. S._____, 73 L. ed. 1 is interesting as illustrating the immateriality of the means employed in transportation. In that case persons in Louisiana contracted to transport and deliver shrimp from the state of Louisiana in the state of Mississippi. As a matter of fact, the record disclosed that the fishermen in the transporting engaged the boats of the buyers and used them for such purpose.

In the case of **Heyman v. Hays,** 236 U. S. 178, 59 L. ed. 527, it was held that substance and not form determines whether a given transaction is interstate commerce.

In **R. R. Co. v. Covington,** 235 U. S. 537, 59 L. ed. 350, it is held that interstate commerce must be determined by what is done and not by the nature of the carrier.

In **Gloucester Ferry Co. v. Pennsylvania,** 114 U. S. 196, 29 L. ed. 158, it held that the means employed to transport property is immaterial.

Judge Anderson, speaking for the supreme court of the state of Mississippi in this case, laid emphasis upon the fact that the transportation receipt issued by the master of the packer's boat in this case was a pure subterfuge and determined that the transactions were intrastate. We wish briefly to direct the attention of the court to this phase of the case.

1. Judge Anderson states that Mr. Royster (R. 31) testified that this method of transportation was a mere subterfuge in order to confer upon the shipments interstate characteristics. We respectfully submit that the testimony of Mr. Royster is not susceptible to any such construction, and it is for this court to determine the facts under the assignment of error herein involved.

2. It was perfectly competent for the purchaser and the seller to make any agreement they saw fit respecting the passage of the title. In **Harkness v. Russell**, 118 U. S. 663, 30 L. ed. 285, THIS COURT USED the following language:

> "The rule is formulated in the textbooks and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established: 1. That where, by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. 2. That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackburn, Sales, 152. And it is subsequently added that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled.' Blackburn, Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property adds, to the two formulated rules of Lord Blackburn, a third rule, which is supported by many authorities, towit: 3. 'Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' Benj. Sales, 2nd ed. p. 236; 3rd ed. sec. 320. The author cites for this proposition **Bishop v. Shillito**, 2 B. & Ald. 329, note A; **Brandt v. Boldy** 2 Barn & Ad. 932; **Barrow v. Coles**, (Lord Ellenborough, 3 Camp. 92; **Swain v. Shepherd**, (Barron Parke), 1 Mood. & Rob. 223; **Mires v. Solebay** 2 Mod. 243."

The same rule was announced in **U. S. v. Woodruff**, 89 U. S. 180, 22 L. ed. 863. The rule was examined and reaffirmed **Segrist v. Crabtree**, 131 U. S. 287, 33 L. ed. 125; and the rule

was examined and reapplied in **Beardsley v. Beardsley,** 138 U. S. 262, 35 L. ed. 928.

In **Williston on Sales,** 2nd ed. Vol. 1, par. 259, the following rule is announced:

> "259. Property is transferred when the parties so intend—Provisions of the Sales Act.
>
> "Sec. 18. Property in specific goods passes when parties so intend—(1). Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2). For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

The right of persons to make necessary contract with reference to their business and in respect to the acquirement and enjoyment of life, liberty or property is protected by the constitution of the United States. **Algeyer v. Louisiana,** 165 U. S. 578, 41 L. ed. 832.

3. There is still, however, a further answer to the criticism and it is this: that interstate commerce must be determined by the nature of the transactions, and if the transactions possess the characteristics and essentials of interstate commerce, they are such, irrespective of what parties may term them. At the same time the form of billing and/or the terms applied by the parties to the transaction may be looked into in order to determine the real nature of the transaction. Suppose that these shipments, instead of going to Louisiana, as a matter of fact, had gone to some point in Mississippi; then the remarks of Judge Anderson would have been applicable and the arraignment would have been a fraud, in fact and in law. But it is undisputed, and the opinion so shows, the shipments were intended to go and actually went in interstate

commerce. Therefore, they were inherently interstate commerce, possessed all the essentials and characteristics of interstate dealings, and it was perfectly proper for the parties thereto to use any form of contract or billing tending to identify and preserve the interstate characteristic of the transactions.

In **Savage v. Jones**, 225 U. S. 501, 56 L. ed. 1182, Mr. Justice Hughes used the following language:

> "In answer, it must again be said that 'commerce among the states is not a technical, legal conception, but a practical one, drawn from the course of business.' **Swift & Co. v. U. S.**, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; **Rearick v. Pennsylvania**, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 150. It apearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contract of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest."

Substance and not form must determine the nature of the transaction. Regard must be had for what was dones. **Heyman v. Hays**, 236 U. S. 178, 59 L. ed. 527; **R. R. v. Covington**, 235 U. S. 537, 59 L. ed. 350.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181 is directly in point. In that case the plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana, and was selling the products of its refinery and factory upon orders taken from traveling salesmen. In order to fill orders taken in Tennessee it shipped into that state a tank car of oil and a car of steel barrels. Both the oil and the barrels were billed to the plaintiff in Tennessee, and orders were filled by taking the oil from the car and put the same into steel barrels for delivery to customers in pursuance to orders previously

taken. This court held that the transactions were interstate commerce and not subject to state taxation, using the following language:

"In the second part of the decision we think the court erred. Unlike **Gulf C. & S. F. R. Co. v. Texas,** 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier, which rightly conformed its action to what was said in the bill of lading. On the contrary it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a re-billing or reshipment en route does not of itself break the continuity of the movement or require that any part be classified directly from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. **Southern P. Terminal Co. v. Interstate Com. Com.,** 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; **R. R. Com. v. Worthington,** 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; **Texas & N. O. R. Co. v. Sabine Tram Co.,** 227 U. S. 1111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; **R. R. Com. v. Texas & P. R. Co.,** 229 U. S. 336, 57 L. ed. 1215; 33 Sup. Ct. Rep. 837; **Chicago M. & St. P. R. Co. v. Iowa,** 233 U. S. 334, 343, 58 L. ed. 988, 992, 34 Sup. Ct. Rep. 592; **South Covington & C Street R. Co. v. Covington,** 235 U. S. 537, 545, 59 L. ed. 350, 353, L. R. A. 1915, F 792, P. U. R. 1915A, 231, 35 Sup. Ct. Rep. 158."

It must be borne in mind in this case that the purchasers were acquiring oil from the appellant for which orders had been previously taken and the quantity of gasoline purchased from the appellant by the packers corresponded in every particular with the orders previously taken of the packers from the fishermen. This court laid emphasis upon such fact in the last above cited case.

In **Atlantic Coast Line v. Standard Oil Co.**, 275 U. S. 257, 72 L. ed. 270, this court used the following language:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such a character."

The supreme court of the state of Mississippi in its majority opinion arrived at the conclusion that the form of shipping receipt issued by the captain of the boat was a subterfuge, and being such of itself destroyed the interstate character of the transactions, completely leaving out of sight that which is perfectly obvious, towit, that whether the transactions were in interstate must be determined from their inherent, essential characteristics, and if the movements were in interstate commerce they could be made none the less so by a form of transportation receipt which the court thought was a subterfuge. Such an argument is to place more emphasis upon the shadow than upon the form. The transactions were none the less interstate commerce, even if the contracts of shipment in respect to the retention of title were mere shadows. As a matter of fact, however, we submit that it was within the province of the parties to agree as to when the title should pass. We do not believe that such an arrangement could have the effect of changing purely intrastate transactions into those of an interstate nature, but in connection with purely interstate movements and dealings the parties had a perfect right to enter into such contracts to give the movements such billing

and to throw around the transactions any badges or apparel which would identify and preserve the interstate characteristics of the shipment. The contract was important in showing that the parties intended the transactions to be in interstate commerce. Their intention could not transfer purely intrastate shipments into interstate ones. At the same time, their intention was important, and when taken in connection with the fact that such transactions constituted the usual course of business, created and were a regular channel in interstate commerce furnishing from the source of supply to the point of consumption in another state, an important commodity; that the transactions extended over a period of two years, were not isolated and unusual; that the shipments comprised a large number of shipments, towit, approximately 1,000 aggregating in excess of 500,000 barrels, for which taxes are sought in an amount approximating $25,000.00: we respectfully submit that the sales were in interstate commerce, and the state of Mississippi was without authority to lay tribute thereupon. The right to make these sales was not derived from the laws of the state of Mississippi, but came from the fundamental law of the land.

The case of **Browning v. Waycross,** 233 U. S. 16, 58 L. ed. 829 relied upon by the supreme court of the state of Mississippi, is distinguished most excellently in the dissenting opinion of Judge Ethridge (R. 68). At page 75 he uses the following language:

"In that case the goods had been shipped and delivered to the purchaser, but the contract called for in addition to the delivery of the goods at destination, that the seller would place the rods upon the building which they were purchased to serve. And the question is not whether the transportation from the buyer to the seller was interstate commerce, but whether the business of directing the rods or attaching them to the building was a local business. The court held that it was not an interstate commerce transaction to engage in the business of putting the rods

upon the building. Of course, the erecting of buildings, and the placing of fixtures on them, is not a part of interstate commerce, as it is entirely severable and separate therefrom, and becomes a business or occupation."

It might be helpful to the court for us to go a step further and call attention to the fact that the value of the last above mentioned case as an authority was greatly impaired in the more recent case of **York Manufacturing Co. v. Colley**, 247 U. S. 21, 62 L. ed. 963. In that case the court held that the provision in the contract of sale of an artificial ice plant by which the foreign corporate seller agreed to furnish an engineer to assemble and erect the machinery at the point of destination and make a practical efficiency test before completing said building, was an integral part of the interstate sale and not subject to taxation. In that case, commenting on the Waycross case, this court said:

"But the broad distinction which is established by the statement just made between what was decided in the Waycross case and the question here presented does not rest alone upon the implication resulting from what was under consideration in that case. But, moreover, expressly results from the fact that in the Waycross case, through abundance of precaution, attention was directed to the fact that the ruling there made was not controlling as to a case where the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale; that is, might be made to appropriately inhere in the duty of performance. 233 U. S. 23.

"As, in the second place, since the ruling in **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. ed. 579, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract

includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made. The only possible question open, therefore, is, Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer."

The negotiations looking to the sale of gasoline, the drawing of the gasoline from the storage tanks, the sealing of the same in drums, the transportation of the same to the water's edge and placing the same on boats to be transported to the state of Louisiana, regardless of where the title may have rested during the remainder of the transportation, were essentially connected with and a substantial part of the interstate transaction. In fact, it formed such an important part as that the actual movement could not have taken place without such negotiations, sale and subsequent acts on the part of the seller and the tax was laid upon the sale itself, which made the movement possible, and was that without which the movement could not have taken place.

We respectfully submit that the Mississippi statutes complained of, as construed, violate the commerce clause of the constitution of the United States; that the judgment of the supreme court of the state of Mississippi appealed from was erroneous, and should be reversed.

Respectfully submitted,

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